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JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM INGLIS & SONS BAKING CO., *et al.*,
Cross-Petitioners

v.

ITT CONTINENTAL BAKING COMPANY,
Cross-Respondent

BRIEF OF ITT CONTINENTAL BAKING COMPANY IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

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July 12, 1982

QUESTIONS PRESENTED

1. Whether the court of appeals erred in granting cross-petitioners a new trial on their federal law claims notwithstanding that cross-petitioners had not moved for such relief and that the only purpose of a new trial would be to allow cross-petitioners to try to remedy their failure of proof at the first trial.

2. Whether the court of appeals properly affirmed the district court's exercise of discretion to grant cross-respondent a new trial on cross-petitioners' state law claims.

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BRIEF OF ITT CONTINENTAL BAKING COMPANY IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

William Inglis & Sons Baking Co. ("Inglis") has cross-petitioned for review of the action of the court below remanding Inglis' state and federal law claims for a new trial. ITT Continental Baking Company ("Continental") submits that no issue warranting exercise of this Court's certiorari jurisdiction is presented by the grant of a new trial by the district court on the state law claim. However, substantial questions relating to appropriate practice under Fed. R. Civ. P. 50 are posed by the order of the court of appeals for a new trial on Inglis' federal law claims, and Continental supports the grant of certiorari for the purposes of review by this Court of those questions.

1. Proceedings Below

Inglis claimed violations of the Sherman Act and the Robinson-Patman Act. It also alleged pendent jurisdiction over a state claim under California's Cartwright Act. After a jury verdict for Inglis following a five-week trial, the district court granted judgment n.o.v. on the federal claims, and, alternatively, it granted a new trial to Continental if the court of appeals reversed the judgment n.o.v. The district court also ordered a new trial on the state claim. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, 461 F. Supp. 410 (N.D. Cal. 1978), App. C.[1]

All three judges of the court of appeals panel agreed with the district court that Inglis had failed to prove any violations of federal law. 668 F.2d at 1038-39, 1041, App. A32-34, A39-40. This conclusion should have led to affirmance of the judgment n.o.v. for Continental. Unaccountably, however, and in spite of the fact that Inglis had never asked for a new trial in either the district or the appellate court, the court of appeals, Judge Peck dissenting, remanded to give Inglis a second opportunity to prove its federal claims. 668 F.2d at 1038-39, 1041, 1058-59, App. A32-34, A39-40, A74-75. The court of appeals also endorsed the district court's order for a new trial of the state claims. 668 F.2d at 1050, App. A58.

2. This Court Should Review the *Sua Sponte* Order of the Court of Appeals for a New Trial on the Federal Law Claims

Inglis never asked either the district court or the court of appeals for a new trial in order to correct its failure of proof. Accordingly, the district court never has been called upon to determine whether, in the exercise

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[1] The opinions of the district court and of the court of appeals are reprinted as an Appendix to Continental's Petition for Writ of Certiorari, No. 81-2083.

of its discretion, Inglis should have a second chance to prove its case. Proper judicial procedure dictates that the party obtaining a new trial should, except perhaps in the most unusual circumstances, be required to ask for one, and that such an application should be determined by the district court subject only to review for abuse of discretion. Furthermore, both fairness to defendants, and sound judicial administration, require that plaintiffs should not have a second trial simply because they failed to prove their charges in a first trial in which they were given a full opportunity to make their case.

Federal Rule of Civil Procedure 50(c)(2) provides that a "party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after the entry of the judgment notwithstanding the verdict." Inglis did *not* file such a motion, and thus the district court never had the opportunity to pass on the new trial issue. Whatever the authority of federal courts of appeals to order a new trial *sua sponte* in special circumstances, Federal Rule 50(c)(2) clearly contemplates that the party against whom a judgment n.o.v. is entered will apply for a new trial before one is granted. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 323-24, 327-28 (1967). Because Inglis never applied for a new trial, the parties never addressed the point, and the procedures envisioned by Rule 50(c)(2) were not followed. The result is that a new trial has been ordered so that Inglis may again try to prove its charges, even though no reasons have been stated justifying a new trial for that purpose, and even though Inglis itself, speaking on the matter for the first time in its cross-petition in this Court, has objected to the new trial order.

New trial requests ordinarily ought to be determined in the first instance by the trial courts. *Iacurci* v.

Lummus Co., 387 U.S. 86 (1967). "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone* v. *West Virginia Paper Co.*, 330 U.S. 212, 216 (1947); *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571 (1948). Indeed, preservation of the district court's ability to decide new trial questions is the entire basis for this Court's holding that a verdict-loser must present a motion for judgment n.o.v. to the district court in order to obtain an order of judgment from the court of appeals. *Cone* v. *West Virginia Paper Co., supra.* Presentation of a motion for judgment n.o.v. permits the trial court to decide whether, in the alternative, there should be a new trial, and it also permits the verdict-winner to present to the trial court reasons why he should have a new trial or dismissal without prejudice instead of suffering an adverse judgment because of his failure of proof. *Id.* at 216-18.

This Court in *Cone* specifically rejected the argument that the appellant verdict-winner could present new trial arguments for the first time on appeal. Such a procedure "would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the District Court." *Id.* at 218. Here, of course, the verdict-loser (Continental) did move for judgment n.o.v., thus affording Inglis the opportunity spelled out in *Cone* to ask either for a new trial or a non-suit if the motion were to be granted.

As noted, Inglis neither moved for a new trial before the district court nor asked the appeals court for a new trial as an alternative to reinstatement of its verdict. The only new trial question before the court of appeals was, therefore, the propriety of the trial court's alternative grant of a new trial to Continental. Whether Inglis should have a new trial has never been discussed by the

parties, and the court of appeals majority has not stated any reason—let alone a compelling reason that would justify its highly unusual decision—"why Inglis should be given a second opportunity" to prove its charge of predatory pricing. 668 F.2d at 1058-59, App. A74-75 (dissenting opinion).

A failure of proof, without more, is obviously not appropriate grounds for a *sua sponte* order by a court of appeals for a new trial. As Judge Peck correctly observed in his dissent: "A plaintiff's failing to present competent evidence does not warrant a new trial of the plaintiff's cause." 668 F.2d at 1058, App. A74. Inglis does not claim that its proof was erroneously limited by the trial court. It does not claim it has newly discovered evidence. It does not claim that circumstances beyond its control made it impossible to produce evidence that would have sustained its burden. It does not claim that too high a burden was placed on it. It does not claim surprise. Plainly no valid reason exists in this case to relitigate old matters. It is an abuse of defendant's rights, and wasteful of judicial resources, to let Inglis try once again to prove its charges of violation of the Sherman and Robinson-Patman Acts when all four judges below are in agreement that it failed the first time.

The standard rule has long been accepted that courts "should not grant a new trial merely because the losing party can probably present a better case on another trial . . . ." 6A *Moore's Federal Practice* ¶ 59.07 at 59-111 (2d ed. 1982); *Petition of Long*, 295 F. Supp. 857 (S.D.N.Y. 1968), *aff'd*, 439 F.2d 109 (2d Cir. 1971). This "well-established principle . . . is required for the orderly disposition of judicial business . . . ." *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975). The Second Circuit Court of Appeals has recently observed that, if the appellate court agrees with the district court that a plaintiff has

not proved its charge of antitrust violation, "we must affirm" the judgment n.o.v. *Unijax, Inc.* v. *Champion International, Inc.*, Docket No. 81-7433 (June 21, 1982), slip op. 3425.

Inglis is therefore correct, but for the wrong reasons, that this Court should review the new trial order on its claims of violation of federal antitrust statutes.[2] The action of the court of appeals in itself granting an unsolicited new trial in order that Inglis may improve its proof is inconsistent with the practice contemplated in *Neely*, *Cone*, Rule 50(c)(2), and other authorities. The court of appeals has usurped the preeminent role of the district court in new trial determinations. It has ordered a new trial for no stated reasons and for a purpose that is clearly improper. This Court's careful elucidation in *Neely* of proper appellate practice in Rule 50 situations did not anticipate the bizarre holding in this case. The

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[2] Inglis' reasons for review by this Court of the new trial order for its federal claims are without merit. As discussed below, it is clear that the Seventh Amendment is not violated when trial courts review the evidence to determine whether, in their discretion, a new trial should be ordered. Nor is there any split within the circuits as to the standard of review of these discretionary decisions.

Moreover, as the trial court's opinion shows, there were numerous grounds for ordering a new trial for Continental. The verdict was plainly excessive since it exceeded by some three million dollars plaintiff's maximum permissible claim. 461 F. Supp. at 423-25, App. C19-22. The jury's rejection of the meeting competition defense was clearly against the weight of the evidence. 461 F. Supp. at 423, App. C18-19; 668 F.2d at 1044-48, 1050, App. A46-52, A57-58. The McKinsey report on which Inglis relied so heavily in the trial court, and relies on here, never should have been admitted; both courts below have now concluded that McKinsey was not a co-conspirator and that none of Continental's prices were affected by anything in the report. 668 F.2d at 1038-39, 1055-56, App. A33-34, A69-70; 461 F. Supp. at 422 n.11, App. C16 n.11. Finally, Inglis' reliance on a "wooden reading of a footnote" (668 F.2d at 1058, App. A75 (Peck, J., dissenting)) in a prior opinion to show that Continental's marginal costs were 93 percent of total cost was not probative of the costs that are relevant to measuring whether prices are predatory. 461 F. Supp. at 418-19, App. C7-8, C11; 668 F.2d at 1036-38, App. A29-32.

Court should accept this Rule 50(c)(2) question and make clear the proper procedures to be followed especially where, as here, every judge who has reviewed the matter has held that plaintiff failed to prove a sufficient case to get to a jury.

3. No Issue Worthy of This Court's Certiorari Jurisdiction Is Presented by Inglis' Attack on the New Trial Ordered of Its State Law Claim

Inglis also attempts to persuade this Court to exercise its certiorari jurisdiction to review the unanimous judgment below that the trial judge did not abuse his discretion in awarding Continental a new trial on Inglis' pendent state law claim. This contention is utterly without merit, and clearly not one for ceriorari. It was almost fifty years ago that this Court observed that "a long and unbroken line of decisions" had by then established that the Court "will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact . . . ." *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933).

Inglis argues that the Seventh Amendment bars trial judges from reviewing the evidence and ordering a new trial where, as here, they conclude that the jury reached "a totally erroneous result." 461 F. Supp. at 423, App. C19. At common law judges were granting new trials on failure of proof grounds at least as early as 1665.[8] Common law practice in this regard is of course incorporated into the Seventh Amendment by its terms. This Court has noted the common law origins of the motion for new trial, and has recognized that district courts have authority to set aside verdicts that are unsupported

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[8] Judge Parker's opinion in Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941), includes an often-cited review of some of the common law precedents. *See also* 11 Wright & Miller, *Federal Practice and Procedure: Civil* ¶¶ 2801, 2806 (1973); 6A *Moore's Federal Practice* ¶ 59.08[5] (2d ed. 1982).

by evidence or against the weight of the evidence. *E.g.*, *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 250-51 (1940).

Both courts below were fully aware of the grounds upon which new trials may be, and should be, granted. 461 F. Supp. at 415-16, App. C3; 668 F.2d at 1027, App. A8. This Court has noted that new trial grants are "confided almost entirely to the exercise of discretion" of the district courts. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980). The test on appeal, recognized by all courts of appeals, is whether there has been an abuse of that discretion. *TCP Industries, Inc.* v. *Uniroyal, Inc.*, 661 F.2d 542, 546 (6th Cir. 1981); *Lemon* v. *Bank Lines, Ltd.*, 656 F.2d 110, 116 (5th Cir. 1981). Inglis does not establish a split within the circuits simply by quoting dictum from a Third Circuit case in which a new trial grant was reversed. *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir.), *cert. denied*, 364 835 (1960). As the *Lind* opinion itself acknowledged, a district court's discretionary ruling on a new trial motion will be reversed only where "an appellate court is shown special or unusual circumstances which clearly indicate an abuse of discretion . . . ." 278 F.2d at 88. This is not different in substance from the statements of the test by the Ninth Circuit in this case and in others. 668 F.2d at 1027, App. A8; *Traver* v. *Meshriy*, 627 F.2d 934, 940-41 (9th Cir. 1980); *Angle* v. *Sky Chef, Inc.*, 535 F.2d 492, 494 (9th Cir. 1976). Clearly Inglis has shown nothing even approaching these standards.

CONCLUSION

Obviously no question calling for this Court's review is presented by the unanimous conclusion of the four judges below that Continental should have a new trial on the state claim. Whether, however, the court of appeals should have, *sua sponte*, ordered a new trial in favor of Inglis on its federal claims to correct a failure of proof presents important issues relating to the administration of Rules 50(c) and the related Rule 50(d) that should be resolved by this Court. Accordingly, the cross-petition should be granted limited to this question.

Respectfully submitted,

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